



U.S. FISH AND WILDLIFE SERVICE TRANSMITTAL SHEET

PART 612 FW 3	SUBJECT Reserved/Excepted Right Management: Miscellaneous Receipts	RELEASE NUMBER N/A
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EXPLANATION OF MATERIAL TRANSMITTED:

This chapter provides guidance on the management and oversight of the exercise of privately owned mineral rights within the National Wildlife Refuge System, specifically relating to the collection of fees for anticipated damages.


DEPUTY
DIRECTOR

FILING INSTRUCTIONS:

Remove:

N/A

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612 FW 3

FISH AND WILDLIFE SERVICE
NATURAL AND CULTURAL RESOURCES MANAGEMENT

Natural and Cultural Resources Management

Part 612 Minerals Management

Chapter 3 Reserved/Excepted Rights Management: Miscellaneous Receipts

612 FW 3

3.1 What is the purpose of this chapter? This chapter provides:

A. Guidance on the management and oversight of the exercise of privately owned mineral rights within the National Wildlife Refuge System (Refuge System), specifically relating to the collection of fees for anticipated damages.

B. Information on the law that governs the disposition of fees the U.S. Fish and Wildlife Service (Service) receives in connection with reserved/excepted rights in Louisiana and Texas.

3.2 What is our policy on reserved/excepted rights on Refuge System lands? It is our policy to protect the resources of the Refuge System to the maximum extent possible without infringing on valid existing rights (see 612 FW 1 and 2).

3.3 What are the objectives of this chapter? The objectives of the chapter are to:

A. Integrate potential development and use of valid private mineral rights within the planning and administration of Refuge System lands.

B. Ensure that we follow proper procedures and controls when we receive payment for damages to Refuge System resources that result from the exercise of reserved/excepted rights (see 330 DM 1 and 264 FW 1 and 2 for more information about cost recovery).

C. Ensure that funds collected for site-specific damages to Refuge System lands resulting from the exercise of privately owned oil and gas rights in Louisiana and Texas are disposed of as allowed by law (Pub. L. 106-113).

3.4 What activities does this chapter cover? This chapter provides basic information regarding the statutes, regulations, options, and administrative procedures relating to the exercise of reserved/excepted mineral rights on Refuge System lands. These include the holder's right to sell, lease, explore for, and remove those minerals. The rights are subject to the terms of the instrument by which the interest was acquired or reserved and to State laws governing protection of the surface estate and the Service's rights as the surface owner. Activities associated with these rights are not considered economic activities for the purposes of refuge management and are administered differently. The Refuge Manual (RM), part 5, chapter 17, covers the administration of specialized uses.

3.5 What are our authorities for the exercise of reserved/excepted rights within the Refuge System?

A. National Wildlife Refuge System Administration Act of 1966, as amended, 16 U.S.C. 668dd-668ee (Administration Act). This law provides the mission for the Refuge System, policy direction, and management standards for all units of the Refuge System. The Administration Act clearly establishes that wildlife conservation is the singular Refuge System mission.

B. Fiscal Year 2000 Appropriations Act, Pub. L. 106-113. This law specifically provides that "all funds received by the United States Fish and Wildlife Service from responsible parties, heretofore and hereafter, for site-specific damages to National Wildlife Refuge System lands resulting from the exercise of privately owned oil and gas rights associated with such lands in the States of Louisiana and Texas (other than damages recoverable under the Comprehensive Environmental Response, Compensation and Liability Act (26 U.S.C. 4611 et seq.), the Oil Pollution Act (33 U.S.C. 1301 et seq.), or section 311 of the Clean Water Act (33 U.S.C. 1321 et seq.)), shall be available to the Secretary, without further appropriation and until expended to:

FISH AND WILDLIFE SERVICE
NATURAL AND CULTURAL RESOURCES MANAGEMENT

Natural and Cultural Resources Management

Part 612 Minerals Management

Chapter 3 Reserved/Excepted Rights Management: Miscellaneous Receipts

612 FW 3

- (1) Complete damage assessments of the impacted site.
- (2) Mitigate or restore the damaged resources.
- (3) Monitor and study the recovery of such damaged resources."

C. Migratory Bird Conservation Act, 16 U.S.C. 715-715k, 715n-715r. Section 715i provides for the Secretary of the Interior to make rules and regulations for acquired areas of lands, waters, or interests therein to conserve and protect migratory birds and other wildlife. Section 715e states that rights-of-ways, easements, and reservations retained by a grantor or lessor when the Service acquires areas for wildlife refuges are "subject to rules and regulations prescribed by the Secretary of the Interior" and that "it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior to such rules and regulations as may be prescribed by him from time to time."

D. National Environmental Policy Act of 1969, 42 U.S.C. 4321-4347, (NEPA). The NEPA decisionmaking process applies at the comprehensive conservation planning stage, the issuance of access agreements, and issuance of special use permits. We should make efforts to streamline the process by addressing alternatives and analyzing their impact at the earliest stage.

E. Mineral Rights Reserved and Excepted (50 CFR 29.32). Provides guidelines for people exercising reserved and excepted mineral rights on Refuge System lands and provides for the area to be restored as nearly as possible to predisturbance conditions upon cessation of operations, within the scope of the privately held rights.

F. Other authorities. Depending on the situation, there may be other Federal, State, or local authorities that apply. (See 612 FW 2 for examples.)

3.6 Does the Service have any other guidance on minerals, mining, oil, and gas? Yes. For more information on minerals, mining, oil, and gas, see 612 FW 1 and 612 FW 2. These chapters describe our policy and give guidance for managing these types of activities on Refuge System lands.

3.7 What do these terms mean?

A. Excepted Rights. Any rights outstanding to a third party when the United States (Service) acquires title to lands. The owner of excepted (outstanding) rights has the right to sell, lease, explore for, and remove those minerals subject to the terms of the instrument used to acquire or reserve the lands and to the State laws governing protection of the surface and the rights of the surface owner.

B. Mitigation. Mitigation includes one or more of the following measures that:

- (1) Avoid an impact altogether by not taking a certain action or parts of an action;
- (2) Minimize impacts by limiting the degree or magnitude of the action and its implementation;
- (3) Rectify the impact by repairing, rehabilitating, or restoring the affected environment;
- (4) Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action;

FISH AND WILDLIFE SERVICE
NATURAL AND CULTURAL RESOURCES MANAGEMENT

Natural and Cultural Resources Management

Part 612 Minerals Management

Chapter 3 Reserved/Excepted Rights Management: Miscellaneous Receipts

612 FW 3

(5) Compensate for the impact by replacing or providing substitute resources or environments (40 CFR 1508.20).

C. Plan of Operations. A document requested (or required as a result of the specifics in the deed or instrument of conveyance) of the reserved/excepted rights owner or those acting on his/her behalf describing who, how, when, and where the proposed exploration and/or development activities would be conducted on the Refuge System lands. The plan is to include measures to protect and restore surface resources during and upon completion of exploration and development activities (see 612 FW 2).

D. Refuge System Lands. All lands, waters, and interests therein that the Service administers as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, coordination areas, and other areas for the protection and conservation of fish and wildlife.

E. Reserved Rights. Any rights retained by a seller or grantor in an instrument of conveyance, such as a deed, when selling property to the United States on behalf of the Service. In the case of mineral rights, the owner of the reserved rights has the right to sell, lease, explore for, and remove minerals in accordance with the conditions in the instrument of conveyance to the United States and with pertinent State laws.

F. Rights-of-Way Permit. An authorization document issued by the Regional Director or the California/Nevada Operations Office (CNO) Manager granting rights-of-way over and across Refuge System lands (50 CFR 29.21).

G. Special Use Permit. An authorization document issued by the refuge manager for economic, public, and other uses that are not specifically allowed on Refuge System lands under general or refuge-specific regulations (50 CFR 25.41-45). In some cases the terms of the deed or other instrument of conveyance will require a special use permit. We may also use a special use permit if the holder of a reserved or excepted right agrees to negotiate one with us.

H. Up-Front Fee. A fee assessment consistent with industry practice that estimates the amount of damage generally caused by mineral exploration and extraction. Such fees are usually associated with geophysical seismic survey operations (e.g., shot-hole fees). These are fees for damages that normally result from standard industry practices and are not fees for economic or other specialized uses detailed under the policy for administration of specialized uses (see 5 RM 17).

3.8 Who is responsible for the management of reserved/excepted rights?

A. Director. Provides national policy for determining reserved/excepted mineral rights management on Refuge System lands.

B. Regional Director/CNO Manager. Ensures the reserved/excepted rights and fee collection policy is consistently applied within the Region/CNO.

C. Regional Refuge Chief/CNO Assistant Manager, National Wildlife Refuge System.

(1) Ensures that refuge managers follow laws, regulations, and policies about the management of reserved/excepted mineral rights.

(2) Ensures that activities on coordination areas comply with this policy.

FISH AND WILDLIFE SERVICE
NATURAL AND CULTURAL RESOURCES MANAGEMENT

Natural and Cultural Resources Management

Part 612 Minerals Management

Chapter 3 Reserved/Excepted Rights Management: Miscellaneous Receipts

612 FW 3

D. Refuge Manager.

- (1) Determines validity of a reserved/excepted mineral rights claim in consultation with the Regional Office/CNO Division of Realty.
- (2) Determines what conditions on the exercise of reserved/excepted rights, if any, are in the deed or instrument of conveyance.
- (3) Determines, with the assistance of the Solicitor, State law standards for the protection of the surface owner's interest.
- (4) Where a permit cannot be required, works with the reserved/excepted rights owner to come to agreement on exploration and development standards to avoid, alleviate, or minimize adverse impacts (see 603 FW 2.10). We can put these standards in a special use permit if the owner agrees or in any other form of agreement.
- (5) Reviews any plan of operations developed by the reserved/excepted rights owner or those acting on his/her behalf. This includes measures to protect and restore surface resources during and upon completion of exploration and development activities.
- (6) Monitors compliance of the reserved/excepted rights owner with the plan of operations and/or special use permit, ensuring that reserved/excepted rights owners remove equipment and structures when no longer in use and restore surface resources according to the plan or permit upon cessation of activities.
- (7) Develops and oversees mitigation measures that the deed, other instrument of conveyance, or State laws allow. We will identify and implement these measures through the NEPA process.

3.9 How does the compatibility process affect the exercise of reserved/excepted rights? The compatibility standard (603 FW 2.10) does not apply where subsurface rights are privately held unless the instrument conveying the land to the Service includes a compatibility requirement. The subsurface owner is constrained either by:

- A. Conditions regarding occupation and use of the surface that are expressed in the deed; or
- B. Standards of reasonable use or applicable State standards.

3.10 What procedures do we follow when we receive a request from a reserved/excepted rights owner to enter and conduct activities on Refuge System lands? Upon receipt of such a request, the refuge manager should follow the procedures described in 612 FW 1.9 and 2.9.

3.11 Do we charge fees to administer the reserved/excepted rights program? No, unless the instrument of conveyance requires the reserved rights holder to obtain a special use permit. We do not charge excepted rights owners administrative fees, such as special use or rights-of-way permit fees, because they owned the rights before the Service obtained the land and were not involved in the transfer of the surface rights to the Service. (See section 3.14 for the exceptions to this policy in the States of Louisiana and Texas.)

**FISH AND WILDLIFE SERVICE
NATURAL AND CULTURAL RESOURCES MANAGEMENT**

Natural and Cultural Resources Management

Part 612 Minerals Management

Chapter 3 Reserved/Excepted Rights Management: Miscellaneous Receipts

612 FW 3

3.12 If the reserved/excepted rights owner does not fulfill the obligation to minimize surface occupancy and impacts, what options are available to us?

A. The Service "has the traditional rights of a surface owner under State law, to enjoin or hold liable in damages a mineral interest holder who damages the land in a manner not necessary to enjoyment of his interest, or who fails to minimize the necessary impact of his operations." (Solicitor's opinion dated December 2, 1986, FWS.CW.0661) The opinion also states that "it might also be possible for the Service to employ the criminal sanctions of the NWRSA [Administration Act] to prosecute for harming of birds or wildlife should such be damaged by pollution or disturbance caused by the exploration activities."

B. In addition, when the rights owner does not carry out the requirements of 50 CFR 29.32 or any conditions that were placed in the deed or instrument of conveyance, the rights owner may forfeit any performance bond or other security provided to cover costs of restoration, if such was made a requirement in the deed or in regulations to which the deed applies.

3.13 What options exist for the reserved/excepted rights owner to fulfill responsibilities to restore surface lands and mitigate damages? Where rights owners have these responsibilities, there are three options available:

A. The owner may repair the damage.

B. The owner may contract with a third party acceptable to us to repair the damage. In this case, the third party must obtain a special use or rights-of-way permit. We must comply with NEPA and other environmental statutes for these restoration activities.

C. **In Louisiana and Texas ONLY:** The owner may provide funds to us in the form of an up-front fee for damages anticipated as the result of the exercise of privately owned oil and gas rights.

3.14 Why is there an exception in Louisiana and Texas for us to accept an up-front fee for anticipated damages for oil and gas exploration and development?

A. The FY 2000 Appropriations Act (Pub. L. 106-113) provided us with the authority to receive and retain funds for site-specific damages to Refuge System lands resulting from the exercise of privately owned oil and gas rights associated with such lands in the States of Louisiana and Texas "heretofore and hereafter." We can collect and hold these funds for anticipated damages and assessed damages from oil and gas exploration and development. This is particularly relevant to the standard assessment of up-front fees for geophysical seismic survey surface damages (e.g., shot-hole fees, acreage fees, line fees, etc.) based on standard industry practices and in compliance with State laws.

B. Although State law or practice in other States may allow landowners to collect up-front fees for anticipated damages, an agency of the Federal Government cannot collect such fees unless specifically authorized to do so. This in no way affects the requirement that a landowner be compensated for actual damages related to exploration or development activities.

3.15 How can we use the fees for damages collected in Louisiana and Texas? Public Law 106-113 designates that we may only use these funds to:

**FISH AND WILDLIFE SERVICE
NATURAL AND CULTURAL RESOURCES MANAGEMENT**

Natural and Cultural Resources Management

Part 612 Minerals Management

Chapter 3 Reserved/Excepted Rights Management: Miscellaneous Receipts

612 FW 3

- A. Complete damage assessments of impacted sites;
- B. Mitigate or restore damaged resources; and
- C. Monitor and study recovery of such damaged resources.

3.16 How are the Louisiana and Texas damage funds accounted for and tracked? We must deposit all funds collected under the authority of Pub. L. 106-113 in a U.S. Treasury Resource Management Account (no-year fund code 140X; subactivity 4555). This is the only approved account for depositing these funds. All fees will be available to the Service for expenditure without further appropriation and until expended to complete damage assessments of the impacted site, mitigate or restore the damaged resources, and monitor and study the recovery of the damaged resources. We must maintain strict accountability of the amount of fees collected, deposited, and expended for all Refuge System lands.

3.17 How do we determine damage fees associated with oil and gas activities in Louisiana and Texas?

A. Each damage event, as well as the issues and habitat types on various System lands, is different. We use a variety of tools to assess damage, and the tools available to use will continue to evolve. We assess fees for damages over and above those associated with reasonable access or the level of access required under State law from the exercise of privately owned oil and gas rights by using:

(1) Fee schedules based on standard industry practices and in compliance with State laws, such as the standard assessment of up-front fees for geophysical seismic survey surface damages (e.g., shot-hole fees, acreage fees, line fees, etc.).

(2) Prevailing consulting, construction, and labor rates to determine overall costs of conducting habitat restoration work on Refuge System lands.

(3) Habitat evaluation procedures similar to the steps followed under the National Resource Damage Assessment process to determine monetary value of Refuge System land losses.

B. It is important that we apply fee assessments consistently. All Government financial regulations pertaining to Federal appropriated funds apply to expenditure of the funds received for damages.